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<b>D.L., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 21-1142</b>
	)	<b>Issued: March 23, 2022</b>
<b>DEPARTMENT OF VETERANS AFFAIRS, VA</b>	)	
<b>MEDICAL CENTER, Syracuse, NY, Employer</b>	)	
	)	

*Case Submitted on the Record*

*Office of Solicitor*, for the Director

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On July 22, 2021 appellant filed a timely appeal from a May 25, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 8, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the May 25, 2021 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On July 17, 2019 appellant, then a 58-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on May 17, 2019 he injured his right hip when he slipped and fell on a patient's urine while in the performance of duty. He indicated that he did "the splits" with his right leg slid backwards behind him and felt immediate discomfort in the area of the right posterior hip. Appellant did not stop work.

In a medical report dated August 6, 2019, Dr. Michael T. Clarke, a Board-certified orthopedic surgeon, indicated that appellant related complaints of right hip pain, which he attributed to hyperextending the right hip when he slipped in liquid on May 17, 2019. He noted that he experienced immediate pain in the posterior right hip and, on physical examination, he documented mild deep hip irritation, tenderness over the ischial tuberosity, and pain with hyperextension. Dr. Clarke reviewed x-rays, which revealed mild degenerative changes and femoral neck thickening. He diagnosed right hip pain and offered a differential diagnosis of potential hamstring tear *versus* posterior labral tear. Dr. Clarke recommended magnetic resonance imaging (MRI) scan of the right hip.

A report of an MRI scan of the right hip dated August 30, 2019 demonstrated mild osteoarthritis, a tear of the anterior superior labrum, and a mild partial tear of the right common hamstring origin.

In a follow-up report dated September 6, 2019, Dr. Clarke reviewed the MRI scan results and diagnosed right hip pain. He opined that appellant's pain was originating in the proximal hamstring, and that the May 17, 2019 employment incident was a competent medical cause of the injury. Dr. Clarke recommended physical therapy and medication.

In an October 18, 2019 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary, including a narrative medical report from his treating physician containing a detailed description of findings and a diagnosis, explaining how his work activities caused, contributed to, or aggravated his medical conditions. OWCP afforded appellant 30 days to submit the requested information.

Thereafter, OWCP received a report dated October 1, 2019 from Elizabeth Lannier, a physical therapist, who noted that appellant related right hip pain, which he attributed to a work-related hyperextension injury of the right hip. Ms. Lannier recommended various therapeutic exercises and modalities. Additional notes dated October 3 through November 5, 2019 documented physical therapy treatments for the right hip.

In a follow-up report dated October 22, 2019, Dr. Clarke diagnosed right hip pain and hamstring tendinosis. He performed a cortisone and lidocaine injection.

In an attending physician's report (Form CA-20) dated November 14, 2019, Dr. Clarke diagnosed right hip labral tear, right hip partial tear common hamstring, right hamstring tendinosis,

and right hip pain. He answered in the negative as to whether appellant had a history of a preexisting injury and checked a box marked “Yes” indicating that the diagnosed conditions were caused when appellant hyperextended his right hip after slipping on a vinyl floor at work.

By decision dated November 27, 2019, OWCP denied appellant’s traumatic injury claim, finding that he had not submitted medical evidence establishing a causal relationship between his diagnosed conditions and the accepted May 17, 2019 employment incident. Consequently, it found that he had not met the requirements to establish an injury or medical condition causally related to the accepted employment incident.

OWCP continued to receive evidence including physical therapy notes dated November 8 through 29, 2019.

In a December 3, 2019 follow-up note, Dr. Clarke noted that appellant had experienced significant relief of his right hip pain following the cortisone injection and opined that his complaints and examination findings were related to the May 17, 2019 employment incident.

In a report dated January 14, 2020, Dr. Clarke indicated that appellant was working full duty with ongoing complaints of discomfort in his right buttock. He diagnosed right hip pain and ischial tendinosis of the hamstring insertion and opined that forcible contraction of the hamstring during his fall “could clearly have caused this problem” and “should be related to” his claim. Dr. Clarke injected the area with a steroid.

On February 21, 2020 appellant requested reconsideration of OWCP’s November 27, 2019 decision.

By decision dated May 8, 2020, OWCP denied modification of its prior decision, finding that appellant had not provided rationalized medical opinion evidence supporting causal relationship between his accepted employment incident and his diagnosed medical conditions.

On May 6, 2021 appellant, through counsel, requested reconsideration of the May 8, 2020 decision. Counsel contended that OWCP erred in issuing its May 8, 2020 decision. She explained that Dr. Clarke’s medical reports were sufficient to establish causal relationship and that his reports were not speculative.

By decision dated May 25, 2021, OWCP denied appellant’s request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), finding that his request for reconsideration neither raised substantial legal questions, nor included new or relevant evidence.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>4</sup> OWCP has discretionary authority in this regard and has imposed certain

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<sup>4</sup> 5 U.S.C. § 8128(a).

limitations in exercising its authority.<sup>5</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>6</sup>

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In support of his request for reconsideration, appellant, through counsel, argued that OWCP erred in finding that his claim required a fully rationalized medical opinion in order to establish a causal relationship between his diagnosed medical conditions and the accepted May 17, 2019 employment incident. The Board finds, however, that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. Accordingly, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>9</sup>

Appellant also did not submit any new medical evidence. The underlying issue in this case is causal relationship, which is medical in nature, and he did not submit any pertinent new and relevant medical evidence not previously considered by OWCP. Therefore, appellant is not entitled to further review of the merits of his claim based on the third requirement under section 10.606(b)(3).<sup>10</sup>

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<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECs). *Id.* at Chapter 2.1602.4b.

<sup>7</sup> *Id.* at § 10.606(b)(3); *see L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

<sup>8</sup> *Id.* at § 10.608.

<sup>9</sup> *Id.* at § 10.606(b)(3); *see also C.C.*, Docket No. 19-1622 (issued May 28, 2020); *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>10</sup> *See* 20 C.F.R. § 10.606(b)(3)(iii).

The Board, therefore, finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 25, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board